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No. 89-301

In The

Supreme Court of the United States

October Term, 1989

JOHN MONROE, ET AL.

Appellants,

v.

CITY OF WOODVILLE, MISSISSIPPI, ET AL.

Appellees.

On Appeal From a Three-Judge District Court
For The Southern District Of Mississippi

MOTION TO DISMISS OR AFFIRM

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September 21, 1989

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QUESTION PRESENTED

Whether a three-judge court's finding that there had been no change affecting voting pursuant to § 5 of the Voting Rights Act where no candidate had come forward to qualify for the $50.00 per month town marshall position presents a substantial federal question, especially when any question has been mooted by the town's now having formally abolished that position by preclearance through the United States Justice Department.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were the appellants John Monroe, Jimmy Harris, John Green and all others similarly situated and the appellees City of Woodville, Mississippi, Ron Senko, in his capacity as Mayor, and Charles James, Gary D'Quilla, Tim Sessions, as members of Woodville, Mississippi Board of Aldermen, Joe Townsend, Mary Magee, and Herbert Curry, as members of the City Election Commission and Frances Townsend as City Clerk.

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MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss and/or affirm on the grounds that the question presented on appeal is so insubstantial as not to need further argument. Additionally, this action is rendered moot following preclearance under § 5 of the Voting Rights Act of 1964, 42 U.S.C. § 1973c.

STATUTORY PROVISION INVOLVED

In pertinent part, 42 U.S.C. § 1973c provides that a covered jurisdiction must seek a declaratory judgment

action in the United States District Court for the District of Columbia or a preclearance by the office of the United States Attorney General whenever it "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972 . . . "

STATEMENT

The Town of Woodville neither enacted nor sought to administer a procedure with respect to voting, and, hence, made no change subject to § 5.

The abolition of the defunct municipal office has been precleared by the United States Justice Department.

ARGUMENT

This § 5 Voting Rights Case Presents An Insubstantial Federal Question, Which Question Has Been Mooted By Preclearance.

The Town of Woodville has a population of 1,512 persons. The old town marshall's position, paying only $50.00 per month, had powers virtually coextensive with those of the chief of police whose position has been continually occupied since 1968. By the record on this appeal, there has been no candidate who has attempted to run for the position of town marshall from at least 1977

until the present. After 1977, that position simply withered for lack of interest.

This case is best summarized by the statement of Judge Barbour to counsel for the Plaintiffs/Appellants herein.

> Judge Barbour: Mr. Rhodes, you keep referring to if an election is called. Elections are called by state law and people who want to occupy those elected positions go down and qualify. Usually there is enough interest so that somebody qualifies. In this instance, nobody has qualified. Is there any state law whatsoever that says that the city's got to round up a candidate? Is that basically what you're saying?

Transcript of proceedings, E-16 and E-17, Jurisdictional Statement.

When this litigation began the Appellants sought injunctive relief to ban the implementation of appointed election commissioners and an appointed town marshall in the Town of Woodville, Mississippi.[1] Both issues are now moot. The abolition of both elective officers has been precleared, and the appellants herein so concede. Jurisdictional Statement, p.7, n.14.

Specifically, the precleared Mississippi Election Code provides, effective January 1, 1987, that the election commissioners are to be appointed. Section 23-15-221 Mississippi Code Annotated (Supp. 1986). (See Editor's note

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[1] By their questions presented in their jurisdictional statement, Appellants appear to challenge the failure to call special elections when and after no one qualified to run for town marshall. This issue was never raised in the pleadings or briefs below. The pleadings have never been amended, and this issue cannot be properly before the Court.

preceding Section 23-15-1 of the Mississippi Code, concerning the United States Attorney General's interposition of no objection to the amendment of former Section 23-11-13.) The formal abolition of the town marshall position for the town of Woodville was also subsequently precleared by the United States Justice Department. (Appendix "A"). It is not the case that Woodville had effectuated its 1977 resolution concerning the town marshall. As the three-judge court properly found, Woodville made no change subject to § 5. The town had made only its own resolution to seek an amendment to the State statute effective from and after passage. The authorization from the State legislature to allow appointment of the town marshall was never adopted by an ordinance of the town of Woodville, Mississippi.

In the Jurisdictional Statement here presented, the Appellants for the first time seek to establish some kind of declaratory judgment that previous practices of the Town of Woodville were in violation of § 5 of the Voting Rights Act. The Appellants are alleging that some special elections should have been held. There is no justiciable controversy, however, in having this Court declare what should or might have been by way of prior practice. This Court does not sit to declare history, but to enforce § 5 which can afford no relief in these circumstances. This Court cannot declare to be unenforceable previous election procedures which are already abolished, as approved and precleared under § 5.

Further, Governmental action occurs, by definition, whenever a covered jurisdiction shall "enact or seek to administer" a procedure with respect to voting. *Hathorn v. Lovorn*, 457 U.S. 255 (1982) (applying and interpreting

the language of 42 U.S.C. § 1973c). Only if a change in election procedures is made effective without preclearance is such change "unenforceable." *Id.*, at 269. Here, the Town did not enact or seek to administer a failure of candidates to come forward to fill moribund positions.

Appellent's reliance on two cases, *McCain v. Lybrand*, 465 U.S. 236 (1984) and *State ex rel. Doolittle v. Hays*, 91 Miss. 755, 45 So. 728 (Miss. 1908), is misplaced. *McCain v. Lybrand* held that a § 5 action was not moot when previously enacted provisions of a state law were submitted to the Justice Department as part of a package for approval or preclearance of later enacted sections of that same law. The portions of that case which were not moot had to do with the live controversy remaining as to preclearance for the previously unsubmitted portions of the statute.

In trying to show some remaining controversy, Appellants then say that the City of Woodville should have had special elections, and cite in support of that notion a 1908 Mississippi Supreme Court case, *State ex rel Doolittle v. Hays, supra.* That case properly held only that a public office had not become vacant under definitions then enacted under the Mississippi Election Law. The election law referred to by statute in that 1908 decision has been recodified and/or amended at least three times since that date and is currently in a form precleared by the United States Justice Department in 1987, again rendering any reference to such a statute moot.

This Court has recognized that preclearance moots a § 5 claim. *Berry v. Doles*, 438 U.S. 190, 193 (1978),[2] and, *see*,

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[2] "If [§ 5] approval is obtained, the matter will be at an end." *Id.*

McDaniel v. Sanchez, 448 U.S. 1318, 1322 (1980). There has never been a suggestion from this or any other Court that a declaratory judgment action would lie over purported historic § 5 inaccuracies. There exists no case or controversy over such hypothetical matters. The Fifth Circuit has previously addressed an effort to exercise such historical jurisdiction and has rejected that effort, *White v. City of Belzoni, Miss.*, 854 F.2d 75 (5th Cir. 1988). The Fifth Circuit found that the plaintiffs in that action sought "something akin to a declaratory judgment," and the Fifth the Circuit held that action moot. *Id.*, at 76.

The record in this case shows only that no one served or attempted to serve as town marshall in the City of Woodville from at least 1977 through the present. There had been no voting change effectuated by the Town of Woodville. The Appellants cannot show a live stake in this controversy by way of proving that any one, either identified with the Plaintiff class or otherwise, had made application to be a candidate or to serve in the town marshall position. The town marshall position was abolished with no objection from the United States Attorney General. There is, simply, no case or controversy presented here.

CONCLUSION

There is no substantial federal question on this appeal. Any question has been mooted by § 5 pre-clearance. The appeal should therefore be dismissed and the decision of the three-judge court affirmed.

Respectfully submitted,

DENNIS L. HORN

APPENDIX

U.S. Department of Justice

Civil Rights Division

JPT:MAP:ZIF:gmh
DJ 166-012-3
Y3471
Y5306

Voting Section
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Washington, D.C. 20035-6128

May 2, 1989

Dennis L. Horn, Esq.
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Dear Mr. Horn:

This refers to Chapter 932, S.B. No. 3145 (1977), which permits a change from an elected to an appointed town marshall, and the February 7, 1989, Resolution which adopts that change for the Town of Woodville in Wilkinson County, Mississippi, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on March 3, 1989; supplemental information was received on March 8, 31, and April 27, 1989.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an

objection comes to his attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

By: Illegible
for Barry H. Weinberg
Acting Chief, Voting Section

cc: Ms. Deborah A. McDonald
Southwest Mississippi Legal
Services Corporation